

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
)

Implementation of Section 273 of the)
Communications Act of 1934, as amended)
by the Telecommunications Act of 1996)
)

CC Docket No. 96-254

DOCKETED FOR ORIGINAL

COMMENTS OF SBC COMMUNICATIONS INC.

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SUMMARY

In its Comments, SBC Communications Inc. (“SBC”) invokes the Commission’s acknowledgement of the Telecommunications Act of 1996’s affirmative authorization of Bell operating companies’ (“BOCs”) and their affiliates’ participation in manufacturing and related activities. However, SBC takes issue with the Commission’s undercurrent in the phraseology of the NPRM, and its analysis of Sections 272 and 273 of the 1996 Act, that the foundation of the 1996 Act is the legal principles of the Modification of Final Judgment. The MFJ has ripened to the age of almost 15 years, and its principles have become outdated, particularly in the field of manufacturing-related activities. SBC urges the Commission must to implement the 1996 Act’s manufacturing-related authorizations in light of changes in the industry, as Congress intended.

Specifically, SBC urges the Commission to reevaluate certain aspects of the NPRM in light of these considerations, as follows:

- Contrary to the tentative conclusion set forth by the Commission, Section 273(b) authorizes the BOCs to engage in close collaboration “with any manufacturer of customer premises equipment or telecommunications equipment during the design and development of hardware, software, or combinations thereof” BOCs may collaborate with the entire universe of manufacturers.
- Although Section 273(a) clearly restricts a BOC’s ability to manufacture to the time period after it obtains authority to offer interLATA service, Section 273(a) does not impose the same requirement on a BOC affiliate. Instead, BOC affiliates were given manufacturing relief upon enactment of the 1996 Act, as long as they are separate from the BOC as required under Section 272.
- BOCs are permitted “close collaboration” in the design and development of hardware, software, or combinations thereof related to such equipment. “Close collaboration” should be defined to include any activity required to produce a new product, except for the processing and fabrication of the hardware and software to a finished product.
- Section 273(b)(2) broadly permits any royalty agreement and does not distinguish between royalties paid on the front end of the BOC’s arrangement with the manufacturer or a running royalty tied to a percentage of receipts or per unit

produced. The Commission may not restrict the BOCs' broad statutory authorization to enter into "royalty agreements" with manufacturers.

- Section 273(c) disclosure requirements are statutorily imposed on manufacturing BOCs only. Network disclosure requirements for non-manufacturing BOCs are restricted to Section 251(c)(5).
- In order to avoid misleading the public and to protect the incentive to innovate that accompanies the development of intellectual property, the Commission should limit early disclosure and exempt bona fide equipment trials from the disclosure requirements of Section 273(c)(1).
- As long as BOCs make the appropriate information available in a publicly-accessible format, the Commission should not impose unnecessary regulation on languages, formats, or viewers. Further, the Commission should permit BOCs to maintain their own information.
- The Commission should read Section 273(c)(1) to apply only to Section 273(a) manufacturing authority and not to Section 273(b) activities, and any rules the Commission implements must protect proprietary or confidential information. To effect appropriate network disclosure, the Commission should implement network disclosure requirements parallel to those that have been determined to be sufficient for interconnecting telecommunications carriers.
- Section 273(c)(1) requires the BOCs to report "promptly" to the Commission any material or planned changes to the requirements and protocols. The Commission should only adopt rules, if any are deemed necessary, that require initial protocols and requirements be reported promptly to the Commission as they are determined.
- The Commission should carefully craft its definitions to assure that the certification requirements are not overbroadly applied.
- The Commission must not take Section 273(e) out of its historical context and impose independent procurement obligations on BOCs not otherwise engaged in manufacturing. Section 273(e) should be interpreted as only applying to BOCs that are authorized to manufacture under Section 273(a).
- Section 273(e)(2) requires BOCs to make "procurement decisions and to award all supply contracts for equipment, services, and software on the basis of an objective assessment of price, quality, delivery, and other commercial factors." As long as BOC purchasing decisions are based on an objective assessment of these factors, it cannot be found to have discriminated in violation of Section 273(e)(1)(B). In the context of this section, the word discriminate should be interpreted to mean that a BOC must treat similarly situated entities in a reasonably similar manner.

The Commission should develop in this proceeding the minimum rules necessary under the terms of the 1996 Act and spur competition in manufacturing and related activities through the efficient entry of BOCs and their affiliates.

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COMMENTS OF SBC COMMUNICATIONS INC.

SBC Communications Inc. ("SBC"), by its attorneys and on behalf of its subsidiaries, Southwestern Bell Technology Resources, Inc., and Southwestern Bell Telephone Company, files these comments in response to the Notice of Proposed Rulemaking, released December 11, 1996 in the above-captioned Docket (the "NPRM").

I. INTRODUCTION

As the Commission acknowledges in the NPRM, the Telecommunications Act of 1996¹ affirmatively authorizes Bell operating companies ("BOCs") and their affiliates to participate in manufacturing and related activities.² However, while the Commission has phrased the NPRM in terms that seek and will spur substantial comment, its analysis of Sections 272 and 273 of the 1996 Act is founded upon premises that have aged one and a half decades.³ The Commission

¹Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, to be codified at 47 U.S.C. §§ 151 et seq. ("1996 Act") (all citations to the 1996 Act will be to the 1996 Act as it will be codified in the United States Code). The 1996 Act amended the Communications Act of 1934 ("Communications Act").

²NPRM at ¶ 1.

³NPRM at ¶¶ 2-4. See *United States v. Western Electric Co.*, Civil Action No. 17-49 (D.N.J. filed Jan. 14, 1949) (transferred to the United States District Court for the District of Columbia in 1982 and docketed as Civil Action No. 82-0192); *United States v. AT&T*, Civil Action No. 74-1698 (D.D.C. filed Nov. 20, 1974).

must, therefore, implement the 1996 Act's manufacturing-related authorizations in light of changes in the industry, as Congress intended. SBC urges the Commission to reevaluate certain aspects of the NPRM in light of these considerations.

II. DISCUSSION

A. THE COMMISSION HAS MISCHARACTERIZED PROVISIONS IN THE ACT CONCERNING COLLABORATION, RESEARCH ARRANGEMENTS, AND ROYALTY AGREEMENTS. A BOC MAY ENGAGE IN CLOSE COLLABORATION WITH *ANY MANUFACTURER*, INCLUDING BOTH BOC-AFFILIATED AND NON-BOC-AFFILIATED MANUFACTURERS.

The Commission states that Section 273(b) authorizes collaboration for research and royalty agreements "with other non-BOC manufacturers."⁴ The Commission's tentative conclusion that the language of Section 273(b)(1) forecloses close collaboration between a BOC or an RHC and the manufacturing affiliate of another unaffiliated BOC or RHC is incorrect.⁵

The Commission, in stating that the "broad language of Section 273(b)(1) does not permit close collaboration in either of the following two situations: (1) between a BOC or an RHC and the manufacturing affiliate of another unaffiliated BOC or RHC; or (2) between the manufacturing affiliates of two unaffiliated BOCs or RHCs," appears to have incorrectly applied the specific, limited authorization language in Section 273(a) to Section 273(b)(1). The close collaboration authorization of Section 273(b)(1) is explicit: "Subsection (a) [referring to 273(a)] shall not prohibit a Bell operating company from engaging in close collaboration with any manufacturer of customer premises equipment or telecommunications equipment during the design and development of hardware, software, or combinations thereof related to such

⁴NPRM at ¶ 6.

⁵See NPRM at ¶11.

equipment.”⁶ The term “any manufacturer” includes both BOC-affiliated and non-BOC affiliated manufacturers.⁷ Section 273(b) authorizes the BOCs to engage in close collaboration “with any manufacturer of customer premises equipment or telecommunications equipment during the design and development of hardware, software, or combinations thereof”⁸ The 1996 Act could not be more clear: BOCs may collaborate with the entire universe of manufacturers.

B. THE 1996 ACT DOES NOT PRECLUDE A BOC AFFILIATE FROM PROVIDING MANUFACTURING IMMEDIATELY UNDER THE ACT.

The Commission tentatively concludes that Section 273(a) explicitly authorizes “BOCs and BOC Affiliates” to manufacture and provide telecommunications equipment and to manufacture CPE once a BOC or a BOC Section 272 affiliate is authorized to offer in-region, interLATA service under Section 271(d) in any in-region state.⁹ This conclusion, too, is more restrictive than Congress intended. Although Section 273(a) clearly restricts the BOC’s ability to manufacture to the time period after it obtains authority to offer interLATA service, Section 273(a) does not impose the same requirement on a BOC affiliate. The 1996 Act provides manufacturing relief immediately to BOC affiliates as long as they are separate from the BOC as

⁶Section 273(b)(1).

⁷The legislative history also indicates that close collaboration with other BOCs is permitted by Section 273(b). The counterpart in Senate Bill (S. 652) provided that a BOC and its affiliates “may engage in close collaboration with any manufacturer not affiliated with a Bell operating company during the design and development of hardware, software, or combinations thereof” S. 652, Section 256(d). In the final version, Congress deleted the underlined restriction on close collaboration with a manufacturer affiliated with another BOC.

⁸*Id.* (emphasis added). Section 273(b) also permits the BOCs to enter into royalty agreements with “manufacturers of telecommunications equipment.”

⁹NPRM at ¶ 8.

required under Section 272.¹⁰ Where Congress intended to limit not only the activities of the BOC, but also the BOC affiliate, it did so explicitly.¹¹ This conclusion is also supported by the legislative history of the 1996 Act, which states that “a BOC” (not a “BOC affiliate”) is permitted to engage in manufacturing after the Commission authorizes the company to provide interLATA services under new section 271(d).¹²

C. **"CLOSE COLLABORATION" SHOULD ALLOW FOR ANY ACTIVITY REQUIRED TO PRODUCE A NEW PRODUCT, EXCEPT FOR THE PROCESSING AND FABRICATION OF THE HARDWARE OR SOFTWARE TO A FINISHED PRODUCT.**

The Commission has requested comments on the types of activities that constitute “close collaboration” with any manufacturer of CPE or telecommunication equipment.¹³ As the Commission points out, BOCs are permitted “close collaboration” in the design and development of hardware, software, or combinations thereof related to such equipment”¹⁴. “Close collaboration” should be defined to include any activity required to produce a new product, except for the processing and fabrication of the hardware and software to a finished product. Such activities would include, but would not be limited to: (1) conception of features and functionalities; (2) specification development or refinement; (3) project oversight and management; (4) joint testing; (5) funding development efforts; (6) creating and participating in

¹⁰See Huber, Kellogg, Thorne’s Special Report on the Telecommunications Act of 1996, p. 39.

¹¹See, e.g., Sections 271(a), 272(a)(1), and 274(a).

¹²Conference Report at 154.

¹³NPRM at ¶ 11.

¹⁴Id. (citing Section 273(b)(1)).

joint ventures with one or more vendors; and (7) investing in manufacturing companies.

Permitting close collaboration to include these types of activities will permit all industry participants to remain competitive and to continue to bring new products and services to the marketplace quickly and efficiently. BOCs must be able to work with the manufacturer to provide the exact product or service customers demand. These benefits outweigh any concerns the Commission may have concerning the competitive advantages that a manufacturer may obtain from broadly permitted collaboration.

D. RESEARCH ACTIVITIES AND ROYALTY AGREEMENTS ARE WIDELY PERMITTED.

Section 273(b)(2) permits BOCs to “engage[] in research activities related to manufacturing and . . . to enter into royalty agreements with manufacturers of telecommunications equipment.”¹⁵ In the NPRM, the Commission requests appropriate definitions of “research activities” and “royalty agreements.”¹⁶ However, the Commission couches its request in an opinion that if a BOC is paid a royalty per unit of sales or the royalty is tied to the purchase price of the equipment, the BOC may have substantial incentives to favor equipment on which it collects a royalty even if the equipment is inferior and higher in price to competing equipment. The Commission bases its opinion upon the idea that a BOC will favor even inferior equipment because (1) the BOC will collect a royalty on its own purchases, lowering its net cost of the equipment, and (2) the BOC’s purchases may encourage the other carriers to purchase similar

¹⁵**Id.**

¹⁶NPRM at ¶ 12.

equipment to maintain full interoperability or interconnectivity to the BOC's network.¹⁷ The Commission seeks definitions in light of the potential for anticompetitive abuses.

The BOCs' broad ability under Section 273(b)(2)(A) to engage in "research activities related to manufacturing" requires that BOCs be authorized to engage in research activities related to design, development, and fabrication of CPE and telecommunications equipment.

Under the MFJ, the manufacturing restrictions substantially inhibited innovation and efficiency. Regardless of the expertise of a manufacturer, it cannot successfully develop a potential product if the involvement of its customers is severely limited. In order to accomplish the 1996 Act's express goals, therefore, the term "research activities" must be broadly defined to include all basic and applied research and "proof-of-concept" activity up to and including the development or assembly of experimental research prototypes.

Although the Commission suggests two alternative definitions, the broader alternative, "royalty" as "compensation for the use of property . . . expressed as a percentage of receipts from using the property or as an amount per unit produced," better embodies the purposes of the 1996 Act.¹⁸ In its broadest sense, the term "royalty" connotes monetary payment for access to intangible intellectual property rights. The Commission states the concern that if allowed to collect royalties paid per unit of sales or tied to the purchase price of the equipment, the BOC may have substantial incentives to favor equipment on which it can collect a royalty, even if such equipment is inferior to competing equipment in quality or higher in price.

¹⁷Id.

¹⁸See id. (citing BLACK'S LAW DICTIONARY 1330 (6th Ed. 1990)).

The Commission's conclusion that a BOC may have incentives to favor inferior equipment on which they can collect royalties is misguided for several reasons. First, because of the highly competitive, highly volatile telecommunications industry, a BOC cannot afford the risk of network failures and the resulting customer dissatisfaction which could be caused by the deployment of inferior products.¹⁹ Second, because of the Commission's network disclosure rules, other carriers would not be motivated to purchase inferior equipment a BOC manufacturing affiliate produces in order to maintain full interoperability and interconnectivity.²⁰ With the information gained because of the Commission's network disclosure rules, BOC competitors could purchase quality equipment elsewhere which provides them with full interoperability and interconnectivity. Third, Section 273(b)(2) broadly permits any royalty agreement and does not distinguish between royalties paid on the front end of the BOC's arrangement with the manufacturer or a running royalty tied to a percentage of receipts or per unit produced. Whether or not an incentive to discriminate exists, the Commission may not restrict the BOCs' broad statutory authorization to enter into "royalty agreements" with manufacturers. Finally, the kind of

¹⁹In addition, the substantial, if not complete, abandonment of rate-of-return regulation of the BOCs also removes their alleged incentives to misallocate costs in order to advantage equipment on which they can collect royalties. Most BOCs are no longer governed by rate-of-return regulation at the federal level or at the state level. Further, at the federal level, most BOCs have no other incentive to incur greater than necessary costs, having opted into price cap regulation without sharing. BOCs cannot, therefore, sustain inefficient equipment purchases by passing costs through to customers. Under price cap regulation, BOCs have an incentive to engage in efficient procurement decisions. If BOCs purchase overpriced switches, for example, for their local exchange operations, the only result would be a reduction in net income. The increased cost would come out of BOCs' pockets, not from their customers.

²⁰See, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Second Report and Order (The "Second Interconnection Order") (released August 8, 1996).

discrimination the Commission highlights cannot be the type of discrimination that Section 273(e)(1)(B) was intended to prohibit, because Section 273(b)(2) expressly recognizes that royalty arrangements are permissible.

E. THE REQUIREMENT TO DISCLOSE INFORMATION CONCERNING PROTOCOLS AND TECHNICAL REQUIREMENTS IS IMPOSED ONLY ON MANUFACTURING BOCs, NOT ON NON-MANUFACTURING BOCs.

The Commission seeks comment on whether Section 273(c) applies to all BOCs or only to BOCs that are authorized to manufacture under Section 273(a).²¹ The only way to ascribe meaning to the entirety of the 1996 Act, including its network disclosure obligations under Section 251(c)(5) (and the Commission's rules set forth in the Second Interconnection Order) is to impose the Section 273(c) disclosure requirements on manufacturing BOCs only. Network disclosure requirements for non-manufacturing BOCs are restricted to Section 251(c)(5).

One impetus for the MFJ prohibition on manufacturing stemmed from a fear that the BOCs would give their manufacturing affiliate advance notification of network changes and modifications. Lingering concerns with respect to manufacturing BOCs, although made largely if not completely invalid through the passage of time and the changes that have occurred in the manufacturing market, are mitigated by the information disclosure requirements found in Section 273(c). Information disclosure requirements for non-manufacturing BOCs are found in the Second Interconnection Order.²²

²¹NPRM at ¶ 17.

²²To the extent that the Commission proposes to adopt additional disclosure rules to effect Section 273(c), these rules must--to assure the least burden on BOCs "necessary"--apply only the requirements set forth in Sections 51.325-51.335 of the Commission's Second Interconnection Order, Appendix B, as modified by SBC's Petition for Reconsideration of the Second Interconnection Order.

F. EARLY DISCLOSURE COULD BE HARMFUL.

The Commission seeks comment on the potential effects of early disclosure of products, protocols or technical requirements.²³ Early disclosure not only has a potential to mislead consumers, interconnecting carriers, or manufacturers, it also has a substantial potential to damage BOCs' intellectual property rights in the United States and in foreign countries. In the United States and foreign countries, publication of proprietary information will result in loss of trade secrets. In many foreign countries, public disclosure of an invention prior to the date the patent is filed is an absolute bar to issuance.²⁴ In order to avoid misleading the public and to protect the incentive to innovate that accompanies the development of intellectual property, the Commission should limit early disclosure and exempt bona fide equipment trials from Section 273(c)(1)'s disclosure requirements.

G. THE COMMISSION SHOULD NOT IMPOSE UNNEEDED REGULATION ON A BOCs' DISCLOSURE OF INFORMATION INCLUDING PROTOCOLS AND TECHNICAL REQUIREMENTS ON THE INTERNET.

The Commission tentatively concludes that one method by which the BOCs could satisfy their obligation to "maintain" information in accordance with Section 273(c)(1) would be to place the information on their publicly-accessible World Wide Web sites. The Commission seeks comment on the imposition of certain requirements on BOCs choosing to use the Internet.²⁵ Disclosure of necessary information on the Internet is both appropriate and functional. However, as long as the information is available on a publicly-accessible Web Site, the Commission should

²³NPRM at ¶ 19.

²⁴See Lechter, INTELLECTUAL PROPERTY HANDBOOK at 31 (TechPress 1991).

²⁵NPRM at ¶ 21.

not impose unnecessary regulation on languages, formats, or viewers.

The Commission also requests comment on whether the Commission or the BOC should host the Web Site. Although the Commission may choose to post hypertext links to individual BOC Web Sites, in order to preserve the integrity of its information, a BOC should be permitted to provide its own information via the Internet.

H. DISCLOSURE OF INFORMATION ON PROTOCOLS AND TECHNICAL REQUIREMENTS SHOULD ONLY APPLY TO MANUFACTURING AUTHORIZATION, NOT TO COLLABORATION, RESEARCH, AND ROYALTY AGREEMENTS.

As the Commission points out, broad disclosure requirements “could obligate BOCs to disclose proprietary or confidential information, including information on experimental standards, protocols, or technical requirements.”²⁶ However, as the Commission also recognizes, such disclosures would inhibit innovation and competition. Section 273(c)(1) should be read, therefore, to apply only to Section 273(a) manufacturing authority and not to Section 273(b) activities. In addition, rules implementing these disclosure requirements must protect proprietary or confidential information.²⁷

Moreover, compliance with the network disclosure obligations of Section 251(c)(5), as implemented by the Commission, satisfies the information disclosure requirements of Sections 273(c)(1). Network disclosure requirements that are sufficient for other, interconnecting

²⁶NPRM at ¶ 24.

²⁷Rules mandating a process for the negotiation of non-disclosure agreements, such as those set forth in Commission Rule §51.335--as they may be modified in accordance with SBC’s Petition for Reconsideration of the Second Report and Order in CC Docket No. 96-98--should be adopted.

telecommunications carriers should be sufficient for the purposes of Section 273.²⁸ Information disclosure does not typically work in the context of collaboration and is not necessary in view of other protections provided by Section 273. For example, it is less likely that a manufacturer will collaborate in creating valuable intellectual property if information exchanged between the BOC and the manufacturer must be disclosed early in the process. The nondiscrimination and network disclosure obligations take care of discriminatory procurement that uses secret information about planned changes in the network. But, BOCs should be allowed to collaborate with a manufacturer on a new product that uses a standard interface without triggering Section 273(c)(1).

I. TO ADDRESS CONCERNS REGARDING DISCLOSURE OF NETWORK INFORMATION TO COMPETITORS, BOCs SHOULD BE REQUIRED TO FILE SECTION 273 INFORMATION *AFTER* THOSE PROTOCOLS AND REQUIREMENTS HAVE BEEN DETERMINED.

The Commission requests comment as to how Section 273(b) and Section 273(g) relate. As the Commission notes, Section 273(b) permits BOCs to engage in close collaboration with any manufacturer of CPE or telecommunications equipment during the design and development of hardware, software, or combinations thereof related to such equipment. Section 273(g) authorizes the Commission to “prescribe such additional rules and regulations as the Commission determines are necessary to carry out the provisions of [Section 273], and otherwise prevent discrimination and cross subsidization in a [BOC’s] dealings with its affiliate and with third parties.” The Commission seeks comment on how these sections may be made to work

²⁸See Second Interconnection Order, Appendix B, Sections 51.325-51.335.

together in a manner which is efficient and effective.²⁹ The Commission's stated concern is that "close collaboration" with a CPE or telecommunications equipment manufacturer will result in a BOC or a BOC affiliate having a competitive advantage by having access to network information that it is not available or not available in a timely manner to other competitors.³⁰

The Commission may eliminate the potential problems it envisions by requiring BOCs to file the information Section 273(c)(1) requires with respect to protocols and technical requirements for connection with and use of telephone exchange facilities after those protocols and requirements have been determined, in accordance with existing network disclosure rules (as modified in SBC's Petition for Reconsideration of the Second Interconnection Order). The Commission's rules must recognize, however, that in the case of new services, the specific protocols and technical information may not be appropriately developed or available until after the BOC and the manufacturer have engaged in and completed their collaboration. For example, if a BOC were to enter into a royalty agreement with a company for the development of a specific software product, the protocols and technical requirements might not be known until development of the product was near completion. Section 273(c)(1) already requires the BOCs to report "promptly" to the Commission any material or planned changes to the requirements and protocols. The Commission's rules will be sufficient if they require--in parallel with the Section 273(c)(1) requirements for "changes"--that the initial protocols and requirements be reported promptly to the Commission as they are determined.

²⁹NPRM at ¶ 27.

³⁰Id.

J. ISSUES CONCERNING STANDARDS AND THE STANDARDS SETTING PROCESS.

1. TECHNICAL STANDARDS SHOULD BE CLEARLY DISTINGUISHED FROM QUALITY ASSURANCE STANDARDS.

The Commission seeks comment on how “standards” should be defined to ensure that standards processes are open and accessible to the public.³¹ The term “standards” should be defined so that it does not encompass quality assurance standards. Section 273(d)(4) is intended to address risks of anticompetitive conduct that can arise from standard setting which affects interoperability (i.e., technical standards). Conversely, quality assurance standards merely address the administrative and managerial processes in which a company engages to facilitate the development of a quality product. Quality assurance standards are used to measure the management system of a company, not the product or service produced by the company. Because adherence to a quality assurance standard merely reflects the use of a specified process, it does not guarantee the quality or specifications of a product. It can be indicative only of the probability of the quality of a product. Because there is no direct correlation between quality assurance standards and the final product produced, quality assurance should not be encompassed in the term “standards” as contained in Section 273(d)(4).

2. SECTION 273(D)(4) SHOULD NOT BE INTERPRETED TO PRECLUDE ALLIANCES.

The Commission points out that Section 273(d)(4) “prescribes procedures that are intended to be open to all interested parties in the process for setting and establishing industry-

³¹ NPRM at ¶¶39-42.

wide standards and generic requirements for the telecommunications equipment and CPE."³²

Section 273(d)(4) imposes specific requirements on entities which are not accredited standards development organizations and that establish industry-wide standards for telecommunications or customer premises equipment or industry-wide network generic requirements for such equipment or that certifies such equipment manufactured by an unaffiliated entity. The Commission seeks comment on the extent to which the section could apply to the adoption of standards, specifications, or generic requirements by large carriers, other entities, or alliances, and the appropriate treatment of standards developed or adopted by large entities (e.g., individual Regional Holding Companies ("RHCs"), or alliances which may or may not control at least thirty percent (30%) of the deployed access lines in the United States).

The Commission should not interpret Section 273(d)(4) so as to preclude joint purchasing alliances. These alliances are formed in order to obtain better prices based upon aggregate volume purchases. These alliances have to provide potential manufacturers with a description of product attributes from which the manufacturer alone, or in conjunction with the alliance members, develops product specifications for the telecommunication equipment which will be purchased by the alliance members. The legislative history of the 1996 Act indicates that Section 273(d) was never intended to apply to such activities. The Conference Committee's statement accompanying the 1996 Act states that Section 273 includes provisions "governing standards setting organizations such as Bellcore."³³

³²NPRM at ¶ 49.

³³Joint Explanatory Statement of the Committee Conference, Conference Report 104-458 on S.652, 104 Cong., 2d Sess. (1996), at 154. In addition, standard setting activities that involve less than 30% of the access lines are clearly beyond the scope of Section 273(d)(4) due to the definition

Belcore provides its services in a vendor-neutral manner, i.e., without regard to the identity of the vendor(s) involved in Belcore's generic-requirement activities. Purchasers and suppliers of Belcore generic requirements and specifications are free to utilize, not utilize or modify such specifications as they wish. Unlike Belcore, when two or more carriers decide to jointly purchase equipment, they establish requirements to meet their unique plans and needs. These joint purchasers do not generally make their requirements available to those who are not essential to effectuating the purposes of the joint procurement. The establishment of requirements for a product sold under contract is not synonymous with establishing an industry-wide standards or generic requirements, especially if the joint purchasers do not publish their requirements.

For similar reasons, the Commission should not interpret Section 273(d)(4) to apply to generic requirements or standards developed by individual carriers, such as "individual RHCs, [or] GTE" as the NPRM suggests. Application of Section 273(d)(4) to individual purchase activity would go further beyond the scope of the 1996 Act than application of that section to joint purchasing activity. It would be unreasonable to construe Section 273(d)(4) to require a large carrier to publicly divulge the attributes it desires in a product and any refinements to those product specifications which it develops with its selected manufacturer in order to meet its individual needs.

of "industry-wide." Therefore, this section does not contemplate that the Commission would have any Section 273(d)(4)-type rules relating to such standards. Of course, if during a standard setting process that was initially below the 30%, more entities join so that it becomes "industry-wide," then the rules would become applicable.

3. INTERNAL TESTING OF TELECOMMUNICATIONS EQUIPMENT BY A BOC DOES NOT CONSTITUTE "CERTIFICATION" FOR PURPOSES OF SECTION 273.

The definition of the term “certification” found in Section 273(d)(8)(D) must be clarified. “Certification” should not be interpreted to encompass a BOC’s internal testing and evaluation of telecommunications equipment or CPE prior to deployment in the network. The risk the Commission seeks to avoid is an improper attempt to impose equipment standards through concerted efforts. The problem can be avoided by limiting the definition of “certification” activities to a process involving the networks of multiple local exchange carriers outside of the testing or evaluation of unaffiliated manufacturers’ equipment.

4. “GENERIC REQUIREMENTS” AND “STANDARDS” ARE PRODUCED BY DIFFERENT ENTITIES.

Although a “standard” may be somewhat less detailed than a “generic requirement,” the primary distinction between the two terms involves the type of organization or entity establishing the standard or generic requirement. Typically, “standards” are the result of consensus-building efforts of a standards-setting organization, and generic requirements are developed by a single entity for its own use or for the use of others it designates.

L. AN INDIVIDUAL BOC'S ACTIONS CONCERNING ADOPTION OF SPECIFICATIONS OR GENERIC REQUIREMENTS DOES NOT CONSTITUTE ESTABLISHMENT OF INDUSTRY-WIDE STANDARDS AS DEFINED BY THE ACT.

The plain language of Section 273(d)(4) of the 1996 Act cannot be stretched to encompass research, development, or adoption of standards, specifications, or generic requirements by single, large carriers or carriers within a single holding company. Section 273(d)(4) covers entities that “establish” industry-wide standards or industry-wide generic

network requirements for telecommunications equipment or CPE. Congress was explicit in its definition of the term “industry-wide” to encompass only activities funded by or performed on behalf of local exchange carriers for use in providing exchange telephone service to 30% or more of all access lines deployed as of the date of enactment of the 1996 Act. A BOC’s research and development activities, and activities associated with the specifications and product attributes it is exploring or considering, do not constitute the establishment of industry-wide standards or industry-wide generic requirements as defined in the 1996 Act. A joint purchasing arrangement should similarly be excluded.

Part of the rationale supporting the MFJ’s prohibition on manufacturing stemmed from a fear that the BOCs would manipulate industry standards to favor their own equipment offerings and give their manufacturing affiliates advance notification of network changes and modifications. Those concerns are no longer valid. Since the AT&T divestiture, it has not been possible for one single entity to have control over network or equipment standards, which are now set by standards committees. These committees work on a consensus basis, are open to all interested parties, and include representatives from a broad cross-section of the telecommunications equipment, service provider, and end-user communities. No BOC would be able to manipulate that process to ensure an outcome that would benefit affiliated designers and developers and discriminate against unaffiliated ones.

M. UPON SALE TO SAIC, BELLCORE SHOULD NO LONGER BE CONSIDERED A BOC, BOC AFFILIATE, OR A BOC SUCCESSOR OR ASSIGN.

The Commission’s tentative conclusion that Bellcore will no longer be considered a BOC, BOC affiliate, or a BOC successor or assign when the announced sale of Bellcore to SAIC is consummated is correct. In accordance with this determination, Bellcore should be

permitted to begin manufacturing immediately in accordance with Sections 273(d)(1)(B) and 273(d)(3).

N. **THE ANSI PUBLICATION, *STANDARDS ACTION*, IS A MORE EFFECTIVE MEANS OF COMMUNICATING SECTION 273 INFORMATION THAN THE INTERNET.**

An appropriate vehicle for publication of Section 273(d)(4) information is the ANSI's publication *STANDARDS ACTION*. *STANDARDS ACTION* is the publication in which all United States-developed ANSI-accredited-organization standards are listed.

O. **ANSI PATENT POLICY SHOULD BE ADOPTED.**

Section 273(d)(4)(D) states that any entity that is not an accredited standard development organization shall not "preferentially treat its own telecommunications equipment or customer premises equipment or that of its affiliate, over that of any other entity for establishing and publishing industry-wide standards or industry-wide generic requirements for, and in certification of, telecommunications equipment and customer premises equipment."³⁴ In this context, the ANSI patent policy, which details how a patented item may be included in a proposed American National Standard, assures the integrity of intellectual property included in ANSI's standards.³⁵ The Commission should adopt ANSI's policy as a model for developing Commission rules in this area.

³⁴NPRM at ¶ 57.

³⁵The terms of the ANSI Patent Statement are attached to these Comments.